

No. 13,082

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN COSTELLO, Trustee of the Estate
of Angelo Pagliaro, Bankrupt,

Appellant,

vs.

C. N. GOLDEN,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellee's Brief is an attempt to justify what he now admits to be an unlawful seizure of assets by appealing to the conscience of a court of equity. We respectfully direct the attention of the court to two important factors neglected by the Appellee. The first is the subject matter of the litigation. The Appellant Trustee claims the sum of \$600.00 held by the Appellee which is the excess over one hundred percent of the money Appellee was to receive from the bankrupt, plus the commission Appellee paid on resale. He asks a court of equity to permit him to keep more than 100% of his claim against the bankrupt, and send away empty-handed other creditors of the bankrupt

who will receive far less than 100% of their claims even if they prevail here. In subsequent discussion we will point out that his arguments and authorities are based upon the premise that Appellant is trying to deprive him of part of his contract price rather than a sum in excess of his full price. The second neglected factor is that the Appellee admits he does not come into court with clean hands. He concedes that there is the possibility that his unlawful act, namely, taking property from the trustee without permission of the court was a conversion but attempts to escape the inevitable result by giving his act the meaningless label "technical" conversion. We will show that lawful means were available for Appellee's protection but he did not use them. Courts of equity do not give relief in such a situation.

I.

THE REFEREE HAD JURISDICTION TO MAKE A SUMMARY ORDER; THE REFEREE'S ORDER ALLOWED APPELLEE ALL HE WAS ENTITLED TO; APPELLEE'S WRONGFUL ACT CANNOT DEPRIVE APPELLANT OF HIS STATUTORY RIGHT.

We contended in our Opening Brief that even if the contract in the instant case were "executory" within the meaning of Section 70b of the Bankruptcy Act (11 USCA Sec. 110b), the trustee had sixty (60) days to assume or reject and the Appellee could not shorten that period by unlawful seizure within that period. Appellee first admits that his seizure might be a conversion but contends that the only remedy for

it was by a *plenary* suit. This is error because it is basic bankruptcy law that the bankruptcy court has *summary* jurisdiction over property in the possession of the bankrupt at the date of bankruptcy. *Taubel-Scott-Kitzmiller Co. Inc. v. Fox* (1924), 264 U.S. 426, 44 S. Ct., 396, 68 L. Ed. 770; *Taylor v. Sternberg* (1935), 293 U.S. 470, 55 S. Ct. 260, 79 L. Ed. 599; *Shortridge v. Utah Savings & Trust Co.* (U.S. C.A. 10th 1930), 40 F. (2d) 328.

He says further that if the trustee had retrieved the property by a proper turn-over order, the Referee would be forced to give it right back to the Appellee because the trustee had not assumed the contract within sixty days. Congress, however, has given the trustee sixty days to make a careful determination. It seems to be Appellee's view that he can force a blind choice on the trustee by unlawful seizure within the sixty (60) days and detention of the property until after the sixty (60) days have passed. Under Appellee's view, when the trustee demands return of the property to enable him to make a proper determination of its value and marketability, the vendor may refuse on the basis that the trustee has not made his choice within sixty (60) days even though it was the vendor's own wrongful act which prohibited the trustee from being able to make a proper election. Clearly such an absurd proposition is not the law. As the Appellee has wrongfully seized the property, the trustee is entitled to have it returned by a summary order. As Appellee has disposed of it and cannot return the property, the trustee may demand the

proceeds or at least, as in this case, that part of the proceeds representing the bankrupt's equity in the property seized. This was the view of the Referee who made such an order.

Appellee's statement that the turn-over order was a clever method to get the benefits of a contract without taking the responsibilities ignores the fact that if the trustee had adopted the contract as an executory contract, Appellee would have received no more than he is permitted to receive by the Referee's order. The order of the District Judge reversing the Referee results in a windfall to Appellee at the expense of other creditors.

II.

THE REFEREE'S ORDER ALLOWED APPELLEE THE FULL COMPENSATION REQUIRED BY SECTION 3275; APPELLEE'S CASES ARE NOT IN POINT ON THE RELIEF SOUGHT IN THIS CASE.

California Civil Code Section 3275 provides as follows:

“Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.”

The facts disclose no such aggravated breach here and none has been charged. *Miller v. Modern Motor Co.*

(1930), 107 Cal. App. 38, 290 Pac. 122 holds that Section 3275 is applicable to contracts for the conditional sale of personalty. The instant case is concerned with such a sale.

In the instant case there was a breach by the bankrupt which would cause "a loss in the nature of a forfeiture". If full compensation can be made, the court will relieve from forfeiture. The breach was a failure to pay the contract price and if Appellee can be made whole, Appellant should be relieved from the forfeiture of his equity. Upon payment to Appellee he would be entitled to have the property or its proceeds. But Appellee by his wrongful act deprived Appellant of the means of making compensation. The Referee, acting as a court of equity, circumvented a useless exchange of dollars for dollars and allowed Appellee full compensation out of the proceeds and to relieve the forfeiture ordered him to turn over to Appellant the value of Appellant's equity. This is a clear case for the application of the statutory relief.

Appellee's arguments against the application of this statute are based upon the above mentioned failure to realize that Appellant is not seeking to deprive him of his contract price but only of the excess over that. He states that the equity of the bankrupt was small and he should be allowed to keep the payments theretofore made by him as liquidated damages for the breach. Indeed he should be permitted to keep those payments and Appellant is not asking him to return them. In addition to those payments, he is en-

titled to enough to make up his full contract price plus the commission he paid on resale. All this was allowed him by the Referee's order. Appellant only seeks the excess over this amount.

Many cases have been decided under Section 3275 and in his defense to its application, he cites as a leading California case *Glock v. Howard & Wilson Colony Co.* (1898), 123 Cal. 1, 55 Pac. 713. As Section 3275 was never discussed in the *Glock* case, it is not authority on that section. It is also quite significant to note that the issue in the *Glock* case was whether the buyer could get back the payments he had made and not whether he could get the excess over full payment. An important reason why he could not succeed was that there was a provision that time was of the essence of the contract and a delay of three years from the breach to the action. There is no provision in the contract in this case that time is of the essence and the delay is short. The liberal application of this code section by the courts has not been thwarted by a provision that time is of the essence. *Barkis v. Scott* (1949), 34 C. (2d) 116, 208 P. (2d) 367 (now the leading case on the section).

Appellee further cites *Goldberg v. List* (1938), 11 C. (2d) 389, 79 P. (2d) 1087; and *Liver v. Mills* (1909), 155 Cal. 459, 101 Pac. 299 for the proposition that a three month interval between breach by the buyer and election to resell by the seller gives the seller the right to repossess and retain price installments paid. Once again cases are cited on the right to retain payments rather than to have the excess over full

payment. Neither case mentions Section 3275 nor does either case support the proposition for which it is cited. Neither case even mentions the right to retain payments. *Goldberg v. List* does not even show the time interval between breach and retaking of the property by the seller. We call to the court's attention a statement in *Liver v. Mills* to the effect that where the vendor repossesses, the defaulting vendee may still complete the purchase and perfect his right to receive the property by paying the balance due. 155 Cal. at 462, 101 Pac. at 300. This supports Appellant's case rather than Appellee's.

The two cases are also cited for the proposition that Appellant could not maintain an action against Appellee for possession or conversion if there were no bankruptcy. The trustee of a bankrupt vendee has the right of possession of property in the hands of the bankrupt at the date of the petition. Bankruptcy Act Section 70a (11 U.S.C.A. Section 110a). That possession can only be disturbed by permission of court such as a Petition in Reclamation. *Matter of Dialogue* (1914), 215 Fed. 462, 32 Am. B. R. 183. Appellee's point amounts to nothing more than that if there were no bankruptcy, his act of taking the property would be lawful. This cannot help him because the facts are that there was a bankruptcy and his act was not lawful. Thus Appellant has shown a proper case for the granting of relief under Section 3275 and that Appellee's objections are without merit.

III.

APPELLEE HAD NO REAL DUTIES UNDER THIS CONTRACT; APPELLEE'S FAILURE TO USE PROPER PROCEDURES FOR HIS PROTECTION DOES NOT JUSTIFY MAKING AN ERRONEOUS DEFINITION OF "EXECUTORY CONTRACT".

Appellee's attempt to escape from the definition of an "executory contract" as set forth by Appellant in his Opening Brief consists solely of his unwillingness to accept the views of the court in *In Re San Francisco Bay Exposition* (1943), 50 F. Supp. 344 and of the authors of Collier on Bankruptcy.

He cites seven cases and a digest for the point that prior to the enactment of Section 70b, it was the duty of the trustee to adopt or reject a conditional sales contract. (Appellee's Brief, p. 4.) None of those cases support that proposition. They say absolutely nothing about any duty of a trustee to affirm or reject. They merely point out that the vendee's interest in a conditional sales contract, the right to acquire title upon payment, is property which passes to his trustee who may exercise it if he chooses.

Appellee attempts to bring his contract within the definition of an executory contract as set forth by Appellant. Yet upon examination of the supposed obligations of the seller it appears that there was nothing of substance to be done by him. The so-called obligation to arrange a transfer of the lease was merely a case of formalizing an act that had already been accomplished because the Appellee had put the bankrupt in possession and the bankrupt had paid the rent which went to the owner of the property. As

for the suggested implied duty to "maintain" the lease and to "maintain" the utilities, the contract provided that the *buyer* was to pay all rent and utilities (T.R. p. 56) so the seller had no real duties.

Finally, the Appellee claims that "the equitable reason" for applying Section 70b is that he would risk the loss of the value of his property if the trustee could wait indefinitely "to affirm or disaffirm the contract". Nothing could be farther from the truth. The Appellee could have promptly filed a Petition in Reclamation (and this regardless of whether the contract was executory or not). He did not have to exercise self-help. He now asks the court to approve his wrongful act by distorting the definition of an executory contract.

In conclusion it is submitted that the Appellee should be compelled to return to Appellant the amount he received in excess of the purchase price of the restaurant and the cost of reselling it. To this end the order of the District Court reversing the Referee should be reversed.

Dated, San Francisco, California,

March 5, 1952.

Respectfully submitted,

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